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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GREGORY YOUNG, Defendant and Appellant.	A094322 (Alameda County Super. Ct. No. 139666)

INTRODUCTION

Gregory Young was convicted of one count of assault with a handgun with a firearm use finding and one count of being a felon in possession of a handgun. (Pen. Code, §§ 245, subd. (a)(2); 12022.5; 12021, subd. (a).)[1] He was also found to have suffered five prior convictions, three of which were prior strike convictions. The court sentenced him to consecutive terms of 25 years to life on counts 1 and 2, to a 10-year term on the firearm use finding, and to 5-year terms on each of the three "strike" priors, for a total of 75 years. This appeal followed.

Appellant contends: (1) the trial court abused its discretion in admitting evidence of two prior assaults committed by appellant in 1979; (2) the trial court's refusal to give appellant's pinpoint instruction deprived him of his rights to present a defense and due process; (3) the prosecutor committed prejudicial misconduct during closing argument; (4) the trial court's response to note 5 prevented the jury from considering

[1] All statutory references are to the Penal Code unless otherwise indicated.

constitutionally relevant evidence on self-defense and the lesser included offense; (5) the trial court gave an improper response to jury note 14 on the definition of a reasonable person; (6) the trial court abused its discretion by failing to question the jury or declare a mistrial following the receipt of two notes indicating an impasse; (7) the giving of CALJIC No. 17.41.1 intruded on the privacy of jury deliberations and coerced the holdout jurors to vote with the majority; (8) the imposition of consecutive 25-years-to-life sentences violated *Apprendi v. New Jersey* (2000) 530 U.S. 466; and (9) cumulative error requires reversal. We reverse the assault conviction for cumulative error but affirm the conviction for felon in possession of a handgun.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

Willie Reeves ("Reeves"), the victim, lived with his disabled mother, Mary Reeves, in an apartment located behind the house at 3301 Chestnut Street where appellant lived with his wife Diana Young and her two children. Reeves and appellant had been neighbors for about a year and had occasional disputes over the driveway that they shared. Reeves's mother was wheelchair bound, so he needed a clear lane along the driveway to wheel her to and from the apartment. Appellant would occasionally park his car in such a manner as to block the wheelchair access.

On August 3, 2000, Reeves's 60-year-old uncle Jimmy Watt, who was staying with him, came home and said he was having trouble with appellant about the parking situation. When Watt went back to his car to get something, Reeves went with him. Reeves walked up the driveway to a point near appellant's porch where he saw appellant and Diana. As Watt was walking back from his car, Diana yelled insults at him, calling him an "old blackass gray motherfucker." Watt yelled back. Reeves intervened and told Diana and Watt not to be so disrespectful to each other. Watt continued walking back to the apartment. As Watt entered the apartment, Reeves turned to leave too. As Reeves was walking to his apartment, appellant began hurling insults, including calling him a "bitch" three times. By the third time, Reeves responded, saying "if he saw a bitch, come down the stairs and slap her," which he intended as a challenge to a fist fight. Appellant

bolted off the porch and ran down the stairs. Reeves looked down to kick off his sandals, and when he looked up, appellant had pulled a gun. Reeves stopped moving. His left hand was in his pocket with his thumb on the outside, and his right hand by his side. Appellant then shot Reeves in the thigh. Reeves fell to the ground. Appellant looked at him for a second, then turned and left. Reeves called for help, and Diana came to his assistance.

Reeves is right-handed. He testified that he did not have a gun in his pocket and was not reaching for anything with his left hand when he was shot. He had an old rusty pocketknife with a broken blade in his left pocket, which could not be readily opened.

Oakland Police Officer Stan Mock, who responded to the scene shortly after the shooting, testified that he searched Watt as well as the victim's apartment and found no gun. An evidence technician for the Oakland Police Department testified that she removed the items from Reeves's pockets and found no gun.

Reeves recounted two prior run-ins with appellant over driveway access. His mother is a big person, and it was difficult to push the wheelchair over the ground next to the driveway when the driveway was blocked. Once, Reeves went to appellant's door to ask him to move his car, and appellant responded by telling Reeves he was going to get his gun. Reeves thought appellant was bluffing and waited a brief time before leaving. Appellant never appeared with a gun. Another time when the driveway was blocked, Reeves was pushing his mother's wheelchair past appellant and mumbling complaints about appellant's failure to move his car. Appellant said, "What the fuck you looking at?"

Reeves admitted on direct examination that he had had some problems with the law. He had stolen two burritos from a 7-Eleven store and had had physical arguments with his mother. Reeves had two misdemeanor convictions involving physical violence. One was for disciplining his daughter with a belt, and the other was for pushing his sister Deborah Jordan.

Defense counsel cross-examined Reeves about nine prior acts of violence. Reeves did not remember an incident on December 13, 1988, in which Elizabeth Quinn, with

whom he was living, called the police because he had struck her on the head with his fists. He did not remember an incident in April 1989 in which he punched his mother in the head three times, hit her with a brass ornament, and spit on her during an argument over the newspaper. Reeves had a vague memory of another incident with Elizabeth Quinn in July 1989 in which she called the police after he kicked her three or four times during an argument over the loss of either $9 or $90. Reeves recalled being arrested for hitting his sister in January 1991, but denied that he had hit her. He claimed no memory of an arrest for assaulting Quinn again in June 1991, or of threatening to kill her, or of telling the police he had assaulted her 15 times that day. Reeves did not recall attacking his mother, punching her, hitting her in the head, kicking her when she fell, and wrapping a phone cord around her neck in March 1994. He recalled his mother calling the police but denied attacking her. He testified that he only tried to block his mother when she tried to hit him. He pleaded guilty only because his mother lay on the floor and put a phone cord around her own neck. Reeves recalled an incident with his daughter in January 2000, but he denied that he kicked her, threw a doll at her, and punched her in the arm. He pleaded guilty to corporal punishment for "two licks with a belt" on his daughter for another incident in February 2000. Reeves denied that he attacked his mother as well during that incident.

The prosecution presented testimony by two people who had grown up in the same East Oakland neighborhood as appellant and had been shot by appellant in separate incidents in 1979. Elmer Robinson testified that he went into a neighborhood bar on October 26, 1979, and saw appellant shooting pool. At some point, Robinson bet appellant $10 that he could not sink two balls in a row. Appellant made the first shot but missed the second shot. He paid Robinson and left. Robinson went outside to smoke. Appellant approached him, asked if he was still gambling, and shot him.

Michael May testified that on November 24, 1979, he and several others were hanging out on a street corner when someone shot May in the arm. May testified that he lied at the preliminary hearing on January 9, 1980, and blamed appellant to get him out of the way because they were both interested in the same girl. Appellant's cousin actually

shot May. Out of the presence of the jury, May declined the court's offer to appoint counsel because of the possibility of a perjury charge.

Inspector Jack Huth, an investigator for the Alameda County District Attorney's Office, testified that he interviewed May on December 28, 2000, along with the prosecutor. At that time May told him that appellant had shot him in a dispute over appellant's girlfriend. May was upset at being taken from prison so abruptly and told them he would not be cooperative if called to testify.

Defense Case

Diana Young testified that Jimmy Watt banged on her door on the morning of August 3, 2000, and asked her to move her car so he could get his car out. Watt was mad and cursing, saying he was tired of them always blocking the driveway. Watt honked his horn and revved his engine while appellant went to find his keys and move the car. Watt drove off and returned several hours later while appellant and Diana were hanging up laundry on the front porch. Diana heard Watt say, "What's up nigger?" Appellant replied, "Oh, you threatening me?" Diana went out, told appellant "don't even go there," and they both went back inside the house. Inside the house, appellant told Diana he thought Watt had a gun and asked if she had seen it.

Diana and appellant encountered Watt again when they went back outside. The three of them were trading insults again when Reeves walked up. Reeves asked Diana why she was being disrespectful to his uncle. While Reeves and Diana were having a calm conversation, appellant went back in the house. Appellant came out again, and Diana told him to go back in because Watt was just acting silly. Reeves suddenly began to taunt appellant and challenge him to a fight. Appellant asked Reeves if he wanted a fight, and Reeves said "bring it on." Diana saw Reeves gesture with his right hand and put it in his pocket. Appellant rushed down the stairs, and Diana heard a shot. She thought Reeves had shot appellant, but then she saw Reeves fall.

Appellant testified in his own defense that Watt had come to his door that morning demanding that appellant move his car. Appellant moved the car. He later saw Watt pull up in front of the house, open the console in the car, grab a pistol, and put it in his pocket.

Watt came up the driveway, and they exchanged words. Watt went to the back, and appellant went in his house and told his wife about the gun. Sometime after that, his little girls ran and told him there was an argument outside with their mother.

Appellant retrieved a loaded gun from the attic and put it in his pocket because he had seen Watt with one. Appellant had found the gun in his yard about a year before and had put it in his attic. Appellant went out and saw Diana and Watt arguing and Reeves approaching. Reeves and appellant then started calling each other names and Reeves challenged him to a fight. Appellant went down the stairs and turned toward Reeves. Reeves started coming at him and put his hand in his pocket. Appellant believed Reeves was reaching into his pocket to get a gun or weapon. Appellant could think of no other reason why Reeves would reach into his pocket after challenging him to a fight. Appellant drew his gun and shot at Reeve's hand. Appellant then backed off and fled because he was scared.

On cross-examination, appellant admitted he had four or five prior felony convictions. He also admitted that he was not supposed to have a gun. Appellant acknowledged telling the police that he sat down for a moment after retrieving the gun and asked himself whether it was worth it.

The defense called Manga Singh to testify. He ran the 7-Eleven store from which Reeves had stolen the burritos. Singh testified that Reeves refused to pay for the burritos and threatened to beat him up.

The defense also called Reeves's mother, Mary Reeves. She testified that she did not remember much about an incident in April 1989 because she had two strokes to the brain in 1989. She confirmed that it was her signature on a statement she gave to the police about an incident in March 1994. She denied telling the police that her son had a violent temper or that he ever hit her with his fist or kicked her. She admitted that Reeves had hit his daughter with a belt. She had never seen Reeves with a gun, nor had he ever pulled a knife on her.

DISCUSSION

1. Admission of prior assaults

Appellant contends the trial court abused its discretion in admitting the testimony of Elmer Robinson and Michael May describing two assaults committed by appellant in 1979. Appellant asserts the offenses were not sufficiently similar to have qualified for admission on the issue of intent because neither involved any claim of self-defense, and they were too remote in time to be relevant to the current charge.

The People moved under Evidence Code section 1101, subdivision (b), to admit evidence in its case-in-chief of two prior assaults in 1979 to prove intent. The People argued that the assaults on Elmer Robinson and Michael May in 1979 were similar enough to the charged crime to support the inference that appellant probably harbored the same intent in each instance and that his conduct was not the result of mistake or accident. Appellant opposed the motion, arguing that the offenses were not similar, were not relevant to any issue in dispute, and were too remote in time. The court ruled them admissible, stating "it seems clear to me that in each and every case we try that the issue of intent is an issue in the case. The court is going to allow both of the instances to be used in the case in chief." Appellant requested reconsideration of the ruling two different times. The first time, he objected when he learned that the prosecution planned to use testimony by Robinson and May because trial transcripts no longer existed. The second time, appellant argued the offenses were not similar, were remote, and requested the court to exclude the evidence under Evidence Code section 352. The court denied the motions.

In arguing that the ruling was an abuse of discretion, appellant notes that the record contains almost no explanation by the court and no indication that the court ever reached the question of exercising its discretion under Evidence Code section 352 as part of the Evidence Code section 1101 ruling.

The People now do not attempt to justify the ruling under Evidence Code section 1101, subdivision (b). They instead argue that even if the offenses were not sufficiently similar to qualify for admission under Evidence Code section 1101, subdivision (b), they were admissible under Evidence Code section 1103, subdivision (b), and that the ruling

may be affirmed on that ground even though it was not raised below. They recite the familiar rule that a decision, if correct in law, will not be disturbed on appeal merely because it was given for a wrong reason. (*People v. Smithey* (1999) 20 Cal.4th 936, 972; *People v. Zapien* (1993) 4 Cal.4th 929, 976; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

Section 1103, subdivision (b), provides in relevant part: "In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence had been adduced by the defendant under paragraph (1) of subdivision (c)."

The record reveals no reliance on Evidence Code section 1103, subdivision (b), by the People at trial. The defense, however, did assert Evidence Code section 1103, subdivision (a)(1), as the basis for cross-examining Reeves regarding prior acts of violence he had committed.[2] This was done after the court had already ruled evidence of appellant's prior assaults admissible under Evidence Code section 1101, subdivision (b). The prosecution, by contrast, never asserted subdivision (b) of Evidence Code section 1103 as a basis for admitting evidence of appellant's prior assaults.

Appellant argues that the "right rule/wrong reason" justification for the court's ruling does not apply to a situation such as this where the court's decision was committed to the exercise of trial court discretion as opposed to a purely legal question. Proper

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2 Evidence Code section 1103 provides in pertinent part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. . . ."

exercise of discretion under Evidence Code section 352 is necessary to save statutes permitting the admission of propensity evidence from violating a defendant's right to due process. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918 [trial court's discretion to exclude propensity evidence under section 352 saves Evid. Code, § 1108 (admission of uncharged sexual misconduct) from due process challenge].) When the issue involves a purely legal question, it is appropriate for the reviewing court to follow the general rule that a correct decision of the lower court will be affirmed even if made for the wrong reason. But it would be incongruous for an appellate court, when reviewing a discretionary order, to rely on reasons not cited by the trial court. "Otherwise, we might uphold a discretionary order on grounds never considered by, or, worse yet, rejected by the trial court." (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1542.)

Appellant also argues that it would be unfair to allow the People to raise a new theory now to justify an evidentiary ruling when, as here, he had no opportunity to defend against the theories of "violence" and "propensity." The state's failure to give notice of its alternative theory misled the defense and kept it from developing appropriate trial strategy. Had the Evidence Code section 1103, subdivision (b), theory been offered at trial, the defense could have chosen to call additional witnesses as to Reeves's violent acts and foregone cross-examination of Reeves. The prosecutor then would have been confined to presenting the character evidence against appellant in rebuttal. (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1175-1176.)

We are persuaded that it would be inappropriate to allow the People to raise a new theory of admissibility in these circumstances. Accordingly, we review the correctness of the ruling under Evidence Code section 1101, subdivision (b), that the prior offenses were relevant and admissible on the issue of appellant's intent. To be admissible under Evidence Code section 1101, subdivision (b), evidence of a defendant's uncharged conduct must also pass muster under the policies set forth in Evidence Code section 352. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) The latter requires an exercise of discretion in determining whether the probative value of the evidence is "substantially

outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

The record contains no explanation of the court's reasoning to support its view that the other offense evidence was relevant to show intent. The court never mentioned the issue of remoteness even though it was argued in appellant's written opposition and was mentioned once by defense counsel at trial. Although the record need not contain a discourse by the court on its weighing of prejudice versus probative value under Evidence Code section 352, it must affirmatively show that such weighing occurred so that there is an adequate basis for appellate review. (*People v. Arias* (1996) 13 Cal.4th 92, 155-156.)

In this case, the record provides little basis for us to conclude that the court undertook the weighing process required under Evidence Code section 352. There was little similarity between the 1979 offenses and the charged offense except for the fact that appellant shot a gun. There was certainly no distinctive pattern that would support an inference that appellant's claim of self-defense was untrue. The probative value of the prior offenses was also lessened by the fact that they were committed 21 years prior to trial. "Remoteness" or "staleness" of prior conduct is an appropriate factor to consider in a section 352 analysis. (*People v. Harris* (1998) 60 Cal.App.4th 727,739.) Although there is no bright-line rule, courts have often found offenses committed 20 or more years ago to be too remote to qualify for admission. (See, e.g., *People v. Harris*, *supra*, 60 Cal.App.4th 727 [23-year-old prior conviction should have been excluded under § 352]; *People v. Clair* (1992) 2 Cal.4th 629, 654-656 [22-year-old prior conviction properly excluded under § 352 for impeachment]; *People v. Thomas* (1978) 20 Cal.3d 457, 466 [testimony regarding offenses occurring between 10 and 18 years earlier should have been excluded under § 352].)

The People maintain the record is sufficient to show the court exercised its discretion under Evidence Code section 352 because the court sustained a section 352 objection when the prosecutor asked Robinson to show the jury his scar during his testimony. That does not assure us that the court undertook the requisite weighing

process in ruling on the admissibility of the prior offenses themselves. The People also assert that the prior offenses were not too remote, citing two cases involving prior sexual offenses found admissible under Evidence Code section 1108. *People v. Branch* (2001) 91 Cal.App.4th 274 (no pet. for rev.) approved the admission of evidence of a 30-year-old molestation of the defendant's then 12-year-old stepdaughter on a charge of molestation of the defendant's 12-year-old step-great-granddaughter, emphasizing the similarity between the offenses and the relevance to show common scheme and plan and to refute a claim of accidental touching. *People v. Waples* (2000) 79 Cal.App.4th 1389 (pet. for rev. den. Aug. 9, 2000) approved the admission of evidence sexual molestation 20 years earlier under circumstances similar to charged offenses, concluding the similarities between the offenses balanced out the remoteness. (*Id*. at p. 1395.) The opinion also stated: "[H]e [defendant] also acknowledges that 20 years is not too remote."

The present case is distinguishable from both *Branch* and *Waples* because the remoteness of the prior offenses was not balanced out by strong relevance to a disputed issue. Other than using a gun to shoot someone, there was no apparent similarity between the prior offenses and the current charge. The record in this case leads us to conclude that the court abused its discretion in admitting evidence of the 1979 offenses under Evidence Code section 1101, subdivision (b). The effect of this error will be discussed in connection with the claim of cumulative prejudice.

2. Refusal to Give Pinpoint Instruction

Appellant contends the court erred in refusing to give the following instruction: "The evidence of Willie Reeves's character for violence and aggressiveness may be considered by the jury as circumstantial evidence from which the jury is entitled to infer that the victim acted in conformity with such character on the occasion of the alleged crime. [¶] Whether the victim acted in conformity with such character is a matter for the jury to determine. It is not necessary to find that the defendant was aware of the victim's character."

A trial court must give requested jury instructions that pinpoint the theory of the defense, but it can refuse instructions that highlight specific evidence as such. Because this type of instruction invites the jury to draw inferences favorable to one of the parties from specified items of evidence, it is considered argumentative and therefore should not be given. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Furthermore, the trial court has no obligation to give pinpoint instructions that are incomplete or erroneous. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 79-81.)

The trial court did not err in refusing the requested instruction because it was incomplete and misleading. Appellant's defense was that he thought Reeves had a gun. Reeves's character for violence and aggressiveness would be relevant but only to the extent that appellant was aware of it. The requested instruction did not convey that message. Without clarification, the instruction was incomplete and misleading.

3. Alleged Prosecutorial Misconduct

Appellant claims the prosecutor committed misconduct during closing argument by stating: "I submit to you that the uncle did not have a gun and you can be sure if Mr. Levy or I could find the uncle, he would have been here to testify that, in fact, he didn't have a gun. Mr. Levy's an experienced defense lawyer, you can be sure that if he had found the uncle, he would have been in here. He found Willie's mother, he found Mr. Singh who worked in the 7-Eleven store, he would have found the uncle."

Defense counsel raised no objection and instead chose to respond to this statement in his argument by stating: "Now, the uncle. Did the uncle have a gun? He's not here to tell us that. [¶] Was the uncle searched? Apparently by the police. Was his car searched? No. Was the house searched? Yes. . . . Did the uncle have a gun? [¶] Mr. Nieto [the prosecutor] suggested to you that if I was really interested in the answer to that question, I maybe could have gone out and found Mr. Uncle [*sic*], Mr. Watt. Remember, I don't have a burden of proving anything. Mr. Nieto has a [*sic*] burden of proving."

The prosecutor responded in rebuttal argument: "And when I mentioned the fact that Mr. Levy didn't bring the uncle in, and I didn't bring the uncle in, I'm not attempting

to shift the burden. But you can be sure, if he would have been found, you would have heard from him" Defense counsel objected at this point, stating "there's no evidence of whether he could be found or not." The objection was overruled.

Appellant contends the prosecutor argued facts not in evidence, vouched for an absent witness and shifted the burden of proof to appellant when he told the jury that if Watt could have been found, he would have testified he never had a gun. Most of appellant's claims are waived by his failure to raise an objection at trial. "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 753.)

The only claim that is properly preserved is that the prosecutor was arguing facts not in evidence because there was no evidence that Mr. Watt could not be found. The prosecutor was arguing an inference, rather than a fact, relating to whether Watt could be found. He asserted it was inferable that Mr. Watt could not be found since neither side had called him as a witness. This is permissible argument. (See *People v. Ford* (1988) 45 Cal.3d 431, 442-445.)

Appellant also contends the prosecutor improperly denigrated defense counsel and the defense by stating: "Now, Mr. Levy obviously doesn't want you to know everything about his client's criminal history." After the defense objection was overruled, he continued, "And I can't blame him for that." Appellant also objects to the prosecutor's use of the term "fog" and argument that the jury should not "get lost in the fog that the defense has put up." The court overruled the defense objection to the use of the word "fog."

References to a defense "smoke screen" have been found not to constitute misconduct. (*People v. Frye* (1998) 18 Cal.4th 894, 978; *People v. Visciotti* (1992) 2 Cal.4th 1, 82, fn. 45.) The references to the defense "fog" are similar and likewise do not constitute misconduct.

The statement about defense counsel not wanting the jury to know everything about appellant's criminal history is a different matter, however. Even in context, the statement is a gratuitous disparagement of defense counsel, which is not justifiable by the evidence or the limits of vigorous argument. Accordingly, we agree that it was misconduct. We will address the effect of this misconduct in connection with the claim of cumulative error.

4. Response to Note 5 from the Jury

On the second day of jury deliberations, the jury sent a note, note 5, to the court with two questions:

"(1) with regard to form Guilty—Ct. 1, the second section of the form where the Jury decides 'great bodily injury.' In the event the Jury decides 'great bodily injury' was not inflicted on Willie Reeves by the defendant, does the Jury then complete form Guilty—ct lio [*sic*] and a misdemeanor (lesser offense) is then declared the verdict?

"(2) with regard to Count 1 the first section guilty or not guilty of use of firearm, if the Jury decides the defendant was not acting in self-defense, is the question of assault withdrawn? (i.e., not guilty)." (Original underscoring.)

The court responded:

"The first step is to decide whether the defendant is guilty or not guilty of Count 1, assault with a firearm. If you decide the defendant is guilty of assault with a firearm, then you are to decide whether the defendant personally used a firearm and/or whether great bodily injury was inflicted. If you find the defendant not guilty of assault with a firearm, you do not then consider whether the defendant personally used a firearm or whether he inflicted great bodily injury. The only time you would consider the lesser included offense of simple assault is if you find the defendant not guilty of assault with a firearm."

The jury's questions, appellant contends, show it was confused about the relationship among the charged crime of assault with a firearm, the enhancements for use of a firearm and great bodily injury, and the impact of self-defense on the charge, the lesser included offense, and enhancements. Appellant maintains that the court's response

was incomplete, incorrect, and inapposite because it never answered the jury's second question about the impact of self-defense on the assault charge.

We agree that the court's response was inadequate and erroneous. The People concede that the court's response violated the rule set forth in *People v. Kurtzman* (1988) 46 Cal.3d 322, that the jury has the discretion to choose the order in which it considers all charges and lesser crimes before reaching a final verdict, but it must unanimously find the defendant not guilty of the greater crime before convicting on the lesser. More importantly, however, the response was inadequate because it failed to address the question about self-defense, which was the heart of appellant's case and the only real contested issue.

The People argue that the error in failing to address the question about self-defense was cured by the court's response to the next question by the jury. In note 6, the jury asked: "Regarding: CALJIC [No.] 5.30 Self-Defense Against Assault. [¶] Does this 'assault' have to be physical? i.e. can the perceived threat be sufficient for the self defense argument to be used." The court responded: "No, the assault need not be physical. Please review CALJIC [No.] 9.00"

We are not persuaded that the court's response to this later question cured the defect in its earlier response.

5. Court's Response to Jury Note 14

On the third day of deliberations, the foreperson sent out the final note, note 14, asking the court:

"Please advise us regarding the following situation that is causing this Jury to remain in deliberation: [¶] Two jurors are defining the actions of a reasonable person on their perception of 'the street' laws of East Oakland and prior experience living in a ghetto. As these Jury members refuse to apply the laws which govern the actions of U.S. citizens (and as provided in the Instructions to Jury book), we remain a hung jury. [¶] Your attention to this matter is greatly appreciated."

Defense counsel objected to the court's proposed response on the ground that it was argumentative, misstated the law, and would mislead the jury. Counsel proposed the

jury be instructed only to reread CALJIC Nos. 5.30 [self-defense against assault], 5.32 [use of force in defense of another], 5.50 [self-defense—assailed person need not retreat], and 5.51 [self-defense—actual danger not necessary].

The court nevertheless gave the following response to the jury:

"First of all, the jurors must consider only evidence that was presented in this trial and not from any other source. Was there any testimony regarding 'the street laws of East Oakland and prior experience living in a ghetto'? All testimony related to West Oakland and there was no testimony regarding a ghetto. Second, the 'reasonable person' referred to in several instructions means a common and reasonable person of the United States who places himself/herself in the defendant's shoes. You are not determining whether the defendant acted reasonably, but whether a 'reasonable person' would have acted as the defendant acted knowing what he knew. (See 5.30, 5.31, 5.32, 5.50, 5.51.) Thirdly, remember that you are not advocates in this case. You are impartial judges of the facts of the case." (Original underscoring.)

Appellant contends that the court's response was erroneous in that it characterized the minority jurors' views as being based on extrinsic evidence rather than their own experience. Evidence was presented that this was a rough neighborhood. Appellant's wife testified that she had found drugs and a gun clip outside her house on various occasions. The frequency of finding such objects led her to check outside her door every morning for contraband before leaving the house with her daughters for school. Appellant finds it clear from the jury's question that the jurors were not injecting extraneous material into the deliberations, but were instead bringing their own life experiences to the discussion. It has long been recognized that jurors' views of the evidence are necessarily informed by their life experiences. (*In re Malone* (1996) 12 Cal.4th 935, 963.) Indeed, in *People v. Steele* (2002) 27 Cal.4th 1230, 1265-1267, it was held permissible for jurors who attended the same military service schools as the defendant to comment during deliberations that, contrary to the defendant's claim, they had not learned to kill in those schools. Their comments were found to fall within the limits of proper reliance on jurors' personal experience and background. (*Id*. at p. 1267.)

Appellant also takes issue with the court's definition of a reasonable person. The reference to a common and reasonable person of the United States, appellant contends, grievously distorted the meaning of "reasonable person." Appellant argues that the response would have been clearer if the court had stuck to the CALJIC definitions, which state that self-defense requires an actual and objectively reasonable belief in the need to defend. Objective reasonableness takes into account what " 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .' " (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) It is judged from the point of view of a reasonable person in the position of the defendant, and the defendant is entitled to have the jury take into consideration all elements that "might be expected to operate on his mind . . . . [Citation.]" (*Id*. at p. 1083.)

We agree that the court's response was confusing and erroneous in that it might have led the jurors to believe they could not consider their own life experiences in viewing the evidence in regard to the question of whether appellant's claim of self-defense was objectively reasonable. The effect of the error will be considered in connection with the claim of cumulative error.

6. Failure to Question Jury Regarding Reported Impasse

Appellant contends the trial court should have polled the jury about the possibility of reaching a verdict after receiving two notes indicating they were at an impasse. Under Penal Code section 1140, the trial court is precluded from discharging the jury without reaching a verdict unless both parties consent or "unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (§ 1140.) The determination of whether there is a reasonable probability rests with the sound discretion of the trial court. "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730,775.)

The jury began deliberations at 10:07 a.m. on Thursday, January 11, 2001. Over the course of that day, the jury sent the court four notes requesting definitions, exhibits,

and readbacks. The jury deliberated for a total of four and a half hours, not including breaks. The next morning, on January 12, the jury sent the court three more notes before the lunch break at 11:44 a.m., deliberating for two and a half more hours. The third note sent to the court that morning (note 7) provided: "The Jury has 3 contrary votes to the majority. We do not foresee this condition changing w/further deliberation. [¶] Pls. advise. Are there further instructions for the Jury?" The court responded: " Continue to deliberate. You will be going to lunch today. Continue to deliberate after you get back." During the afternoon of January 12, the jury requested more readbacks and sent two notes concerning a juror's upcoming business trips. On the third day of deliberations, Tuesday, January 16, there were three notes, two about jurors' schedules and the final note, note 14, indicating the jury was hung because of the views of two jurors. The jury returned a verdict about two hours after the court's response to note 14.

Much of appellant's argument is a reiteration of his objections to the court's response to note 14. We have already agreed that the response was deficient and erroneous. We do not agree, however, that the court's failure to make an inquiry was erroneous. The notes themselves indicated that further deliberation was possible. Although there are cases discussing inquiries made by courts, appellant has cited no authority indicating that an inquiry was required under circumstances such as these.

7. CALJIC No. 17.41.1

Appellant contends that the giving of CALJIC No. 17.41.1 intruded on the privacy of jury deliberations and coerced the holdout jurors to vote with the majority. CALJIC No. 17.41.1 states: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on any improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

After briefing in this case was complete, the California Supreme Court decided *People v. Engelman* (2002) 28 Cal.4th 436, which disposes of appellant's claims. *Engelman* held that the giving of CALJIC No. 17.41.1 did not constitute error but that it

should not be given in future cases. Specifically, the court rejected claims that the instruction infringed upon the defendant's federal and state constitutional right to trial by jury and his state constitutional right to a unanimous jury verdict. (*Id*. at p. 444.) Nevertheless, the court directed under its supervisory power that the instruction not be given in future trials because it "creates a risk to the proper functioning of jury deliberations and that it is unnecessary and inadvisable to incur this risk." (*Id*. at p. 449.)

8. Consecutive Sentences

Appellant contends that the court's decision to impose consecutive sentences for the assault and the felon in possession of firearm convictions violated the rule set forth in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466. Under both the initiative and the legislative versions of the Three Strikes Law, the court "shall" impose consecutive sentences when there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts. (§§ 1170.12, subd. (a)(6); 667, subd. (c)(6).) Appellant's claim is based on the fact that the trial court made a factual finding that the two offenses were not committed on the same occasion because appellant admitted in his testimony that he had possessed the gun for about a year before shooting. It therefore found consecutive sentence appropriate. Appellant argues that under *Apprendi*, he had a right to have the jury determine whether the crimes were committed on the same occasion and thus were subject to concurrent or consecutive sentencing.

We agree with the People that *Apprendi* is not implicated by the decision to impose consecutive sentences under the Three Strikes Law. *Apprendi* requires that any fact which increases a sentence for an individual crime beyond the statutorily established sentencing range must be presented to a jury for a factual finding rather than a finding by a judge at sentencing. The court emphasized that it was addressing only the decision to increase the maximum range of a sentence and was not addressing the question of a trial court's decision whether to impose consecutive or concurrent sentences. (*Apprendi*, *supra*, at p. 474.)

The Second District, Division Seven, reached a similar conclusion in *People v. Cleveland* (2001) 87 Cal.App.4th 263 (rev. den.), in holding that *Apprendi* was not implicated by the trial court's factual determination under section 654 whether the defendant had the same intent and objective for multiple offenses occurring during a course of criminal conduct. Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. The court distinguished between a sentence enhancement, such as that at issue in *Apprendi*, which increases the maximum penalty for a crime, from section 654, which, when applicable, reduces the total sentence otherwise authorized by the jury's verdict. (*People v. Cleveland*, *supra*, 87 Cal.App.4th at p. 270.)

The determination to impose consecutive or concurrent sentences does not operate to increase the total sentence authorized by the jury's verdict, and appellant's attempt to distinguish *Cleveland* is unpersuasive. *People v. Deloza* (1998) 18 Cal.4th 585, cited by appellant, held that the analysis for determining whether consecutive sentences are required under the Three Strikes Law is not coextensive with the analysis for determining whether section 654 permits multiple punishment, primarily because of the difference in statutory language. (*Id*. at pp. 594-595.) The opinion does not address *Apprendi* and in no way suggests that the reasoning of *Cleveland* would be inapplicable to the present situation.

9. Cumulative Error

Appellant contends that cumulative error requires reversal. We agree as to the assault with a firearm conviction but not as to the conviction for possession of a firearm by a felon. Appellant admitted the latter offense during his testimony, and none of the claimed prejudice relates to that offense.

With respect to the assault conviction, the accumulation of errors we have identified manifestly resulted in prejudice to appellant. The court abused its discretion in admitting under Evidence Code section 1101, subdivision (b), testimony of Elmer Robinson and Michael May regarding assaults committed by appellant in 1979. The prosecutor committed misconduct in arguing that defense counsel did not want the jury to

know everything about his client's criminal history. Finally, the court's responses to notes 5 and 14 from the jury contained erroneous and confusing material.

The number of questions submitted by the jury and the length of deliberations indicate the jury was having difficulty with the issues regarding self-defense. During their deliberations, the jury made 14 requests to the court for clarification and guidance. The jury requested rereading of testimony regarding the posture of both appellant and Reeves immediately before the shooting. They also requested appellant's statement to the police, as well as Diana's testimony regarding Reeves's hand gestures. These requests show the jury was very concerned about the sequence of events preceding the shooting and gave careful consideration to that evidence in determining the facts relating to appellant's claim of self-defense. The erroneously admitted testimony by Robinson and May regarding appellant's 1979 assaults on them at a minimum confused the issue, but more likely prejudiced this determination.

The jury also made a number of requests for clarification of the court's instructions. Their questions relating to self-defense reveal a clear division on this issue and a need for clarification by the court. Instead of clear direction, the court gave responses that tended to confuse rather than clarify the issue. The questions about self-defense went to the very heart of appellant's case. Appellant was clearly prejudiced by the court's failure to provide better guidance to the jury.

As a whole, these errors were prejudicial as to the assault conviction. Even if independently harmless, the series of errors rose by accretion to the level of reversible and prejudicial error. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.)

DISPOSITION

The judgment is affirmed as to the conviction of possession of a firearm, and it is reversed as to the conviction of assault with a handgun.

_____
Ruvolo, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.